UNITED STATES OF AMERICA
BEFORE
THE
NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION
d/b/a RIO ALL SUITES HOTEL AND CASINO,

Respondent,

and Case 28-CA-060841

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL 15,
LOCAL 159, AFL-CIO

Charging Party.

BRIEF OF *AMICUS CURIAE* ILLINOIS STATE CHAMBER OF COMMERCE

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Illinois Chamber of Commerce is a voluntary, not for profit organization with over 3,500 members throughout Illinois. As part of its mission, the Illinois Chamber is dedicated to the promotion and adoption of public policies that will improve the general business and legal climate for the benefit of Illinois employers and Illinois citizens. The Illinois Chamber believes that its members will be greatly affected by the National Labor Relations Board's resolution of this matter. Illinois is one of only a handful of states in the Midwest which are **not** right to work states. The Bureau of Labor Statistics reported that in 2017 fifteen percent (15%) of Illinois workers are union members, making Illinois workers among the most heavily unionized workforces in the United States.

The Illinois Chamber's members are joined by their mutual concern over regulatory overreach and actions that threaten entrepreneurs, other employers, employees, and economic growth.

The issue of overriding importance is whether the First Amendment permits the National Labor Relations Board ("NLRB" or the "Board") to force an employer under penalty of law to permit its property to be used to prorogate speech (a message) on topic(s) with which it disagrees. The NLRB's *Purple Communications* rule as adopted or as applied creates a class of favored speech which the NLRB then compels an employer to permit. The First Amendment, and the Court's recent decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) prohibit the NLRB from creating a class of favored speech. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (government regulations of the time, place, or manner of speech are only permissible if they are "justified without reference to the content of the regulated speech").

The Illinois Chamber appreciates that it is a privilege and not a right to appear and address the NLRB as an *amicus curiae*. It most respectfully submits that its views, as set forth below, may be of some assistance to the Board as it resolves the questions presented by this appeal. The Chamber submits this *amici curiae* brief in response to the decision of Administrative Law Judge Mara-

Louise Anzalone in *Caesars Entertainment Corporation d/b/a Rio All Suites Hotel And Casino*, JD (SF) -20-16 (May 3, 2016) and in support of the position of the Respondent.

INTRODUCTION

The Illinois Chamber submits this *amici curiae* brief in response to the decision of Administrative Law Judge ("ALJ") Mara-Louise Anzalone, which held that the Board's decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014) was controlling. In her decision, the ALJ stated:

> I find that insofar as the [Respondent's] rule bans all use of Respondent's email system for nonbusiness distribution and solicitation, it is squarely covered by the new presumption and violates the *Purple Communications* dictate that 'employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email.' (citations omitted).

JD(SF)-20-16, Slip op. 7 lines 40-44.

As is apparent from her holding the ALJ has created a favored class of speech and ordered an employer to permit it on its email system. It is equally apparent that her decision is fatally flawed as it is contrary to the Court's recent decision in *Janus* and the First Amendment as interpreted and applied by the Court.

SUMMARY OF THE CASE

This case involves an unfair labor practice charge filed by Painters District Council 15 against Caesars Entertainment Corporation d/b/a Rio All Suites Hotel And Casino (the "Company" or "the Rio"), which operates a hotel and casino. The unfair labor practice complaint issued on September 30, 2011 alleged the Rio violated the National Labor Relations Act("NLRA") by adopting and maintaining a work rule which prohibited employees' access to the employer's email system for all non-business related purposes including to discuss terms and conditions of employment and union organizing activities.

Rio filed exceptions with the NLRB, which remain pending. On August 1, 2018, the NLRB solicited the filing of amicus briefs. The deadline for filing an amicus brief was subsequently extended until October 5, 2018. This brief is submitted pursuant to that solicitation.

ARGUMENT

I. THE FIRST AMENDMENT'S PROHIBITION AGAINST COMPELLED SPEECH REQUIRES THAT THE BOARD OVERRULE *PURPLE COMMUNICATIONS.*

A. COMPELLED SPEECH IS UNCONSTITUTIONAL SPEECH.

Much has changed since the Board's decision four years ago in *Purple Communications, Inc.*, 361 NLRB 1050, 1065 (2014). Chief among those changes is the United States Supreme Court's opinion and its related analysis in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). In *Janus*, the Court concluded that the First Amendment prohibited requiring public employees to subsidize public-sector union fees: fees then used to fund union speech, as it compelled employees to fund private speech (the speech of the union) with which they did not agree. With all due respect to Member Pearce, to claim that "nothing has changed since the issuance of *Purple Communications* to warrant a re-examination of this precedent" *NLRB, Notice and Invitation to File Briefs* in Case 28-CA-060841, 4 (2018) (Member Pearce dissenting) is to blink reality.

It is clear that compelled speech is implicated in the Board's ability to order an employer to permit employees access to its internal email system, for the limited purpose of using that system to express their opinions regarding matters identified in Section 7 of the NLRA. While it is true that in *Purple Communications* the Board dismissed the constitutional compelled speech doctrine, it did so in a single paragraph which did not give much weight to the doctrine. See 361 NLRB at 1065. *Janus's* emphatic reiteration of this doctrine demonstrates that the Board majority

in *Purple Communications* failed to give adequate consideration to this doctrine with the result the decision runs afoul of the First Amendment and must be overruled (and by implication, or necessity, the NLRB should return to the *Register Guard* standard). The Court's strong support of the First Amendment in *Janus* has, to paraphrase the Court, "eroded the decision's underpinnings" in *Purple Communications* and has "left it an outlier" among the First Amendment cases. *See Janus*, 138 S. Ct. at 2482-83, 2486 (citing *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). As a result, *Purple Communications* no longer withstands analysis under, or is consistent with, the First Amendment and therefore must be overturned. *Cf. R.A.V.*, 505 U.S. at 387 (First Amendment imposes a "content discrimination limitation upon a State's prohibition of proscribable speech"). And since *Janus* teaches what the government cannot prohibit what it cannot compel, the *Purple Communications* rule fails.

While *Janus* generated substantial public outcry, taken line by line the opinion strikes less as reformist, and more as a familiar echo of decades of Court precedent prohibiting compelled speech. *Janus* is consistent with the First Amendment's mandate that "Congress shall make no law. . . abridging the freedom of speech" implying a restraint against instructing private citizens to endorse speech with which they do not agree. U.S. Constitution amendment I. The right of freedom of speech from interference by state action encompasses both the right to "speak freely as well as the right to refrain from speaking at all". *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also W. Va. State Board of Education v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . .").

Janus is consistent with a long line of Court decisions which state that, as a bedrock principle, the State may not require individuals to participate in or endorse speech they do not support. Indeed the Court has applied the compelled speech doctrine to a myriad of hallmark cases protecting this fundamental right. *See, e.g.*, *W. Va. State Board of Education*, 319 U.S. 624 (determining that the state cannot constitutionally force children to stand and recite the Pledge of Allegiance and salute the United States); *Wooley*, 430 U.S. at 705 (motorist could not be forced to serve as a mouthpiece for the state's opinion by displaying the state's motto on a vehicle license plate when the motorist disagreed with the message); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (parade organizer could not be forced to accept a gay and lesbian group's ideology as part of a hometown parade when it conflicted with the parade organizer's message). *Janus* is a powerful reminder that laws compelling speech, as opposed to restricting speech, are "at least as threatening" to preserving the First Amendment's freedoms, as in these situations "individuals are coerced into betraying their convictions". *Janus*, 138 S. Ct. at 2464.

Compelling a person to subsidize speech with which one does not agree is no less a First Amendment violation than a ban on a person's freedom to speak freely. *See, e.g.*, *Knox v. Service Employees*, 567 U.S. 298, 309 (2012); *Lehnert v. Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part); *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). It is clear after *Janus* that in the act of spending money, an individual 'voices' support for a cause, even if tacitly. There exists a delicate line between telling an employer it must allow its employees to speak, for example, during break time, a passive act, and requiring an employer to actively subsidize that employee's speech. *See, e.g.*, *Janus*, 138 S. Ct. at 2486 ("Unless employees clearly and affirmatively consent before any money is taken

from them, this standard cannot be met."); *Knox*, 567 U.S. at 312-313; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of constitutional rights cannot be presumed).

As is often repeated in today's society, "Money talks." This adage finds continued support in *Janus*. The Court twice quotes Thomas Jefferson's famous declaration that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical". *Janus*, 138 S. Ct. at 2464, 2471. Jefferson assuredly did not envision that his words would be applied to the constitutionality of public-sector union agency fees or, as in this matter, the right to use an employer's email system for a favored class of speech the vehicle through which speech is subsidized and thereby compelled. Jefferson's words, however, remain the overarching penumbra under which state action must be analyzed to determine if violation of the compelled speech doctrine under the First Amendment has occurred. Such violations cannot be "casually allowed", *Janus*, 138 S. Ct. at 2464, and should not be permitted to continue as dictated in *Purple Communications,* and Judge Anzalone's recommended decision.

B. *PURPLE COMMUNICATIONS* IS INCONSISTENT WITH THE COMPELLED SPEECH DOCTRINE AND SHOULD BE OVERRULED TO ALIGN WITH *JANUS*.

When viewed in tandem, the similar set of facts presented in both *Janus* and *Purple Communications* demonstrate why a rule requiring an employer to permit the use of its email servers be used to disseminate ideas, should not be "casually allowed" particularly when it acts to require speech with which an employer disagrees. Given the supremacy of the Court as the apex in the American justice system, application of the compelled speech doctrine in cases with similar facts cannot result in vastly different outcomes. As explained below, overruling *Purple*

Communications would align the Board's jurisprudence with the Court's First Amendment jurisprudence as described in *Janus*.

First, as the Court has held, even de minimis monetary costs imposed on an employer are unconstitutional under the First Amendment if the costs are used to fund compelled speech. It is clear the Constitution does not distinguish the degree (or amount) of monetary cost an employer must bear before the protections afforded by the First Amendment become operative. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("Even if a newspaper would face no additional costs to comply … the Florida statute [compelling speech] fails to clear the barriers of the First Amendment …."); *See, also*, *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 5-6, 9-13 (1986) (public utility company could not be compelled to carry a message supplied by a public interest group even when there would be no increase in postage costs to the public utility company).

Despite this clear line of decisions and the clarity with which the Court has spoken, the majority in *Purple Communications* implies that compelled employer-funded speech is permissible when the "incremental costs" are "de minimis". *Purple Communications, Inc.*, 361 NLRB at 1065 n.78. The Court has squarely held that "no law" also means "no funds". Member Miscimarra articulates this well by emphasizing that even if the cost of maintaining employee email only amounts to $10 a day, "[t]he nature of the violation is being forced to pay *any amount* to support speech with which one disagrees, not how much one is forced to pay." *Purple Communications, Inc.*, 361 NLRB at 1107 (Member Miscimarra, dissenting). Thus, allowing the Board to grant itself jurisdiction to compel speech whenever the cost is determined to be minor or de minimus is inconsistent with, and would effectively (and illegally) erode, the protections the First Amendment guarantees.

Janus lends further support for this principle. In *Janus*, the Court refused to uphold a monthly agency fee of $44.58 per month, equivalent to approximately $1.50 per day. If the First Amendment is violated when the cost is only $1.50 per day as *Janus* instructs, speech certainly cannot be compelled when the cost is $10 per day (the cost of the hypothetical email exchange described by Member Miscimarra). Put differently, the First Amendment prohibits compelled speech irrespective of whether any monetary costs are incurred.

Second, union speech, either by way of employer-funded email or funneling agency fees toward a cause antithetical to one's belief system, is inevitably imbued with a controversial bent. *Janus* emphasizes the inherently political nature of public-sector bargaining. Such union activity covers "critically important public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and minority rights". *Janus*, 138 S. Ct. at 2457-58. Similarly, Section 1 of the NLRA makes clear it represents a governmental policy choice, namely, to encourage the removal of disruptions to interstate commerce due to the refusal of some employers to engage in "collective bargaining". 29 U.S.C. § 151 (2012). It is precisely such "political and ideological" causes the Court in *Janus* emphasized that those who do not agree with must not be forced to endorse. *Janus*, 138 S. Ct. at 2461.

Consistent with *Janus*, there is no question that allowing employees the presumptive right to use their employer's email system to organize on behalf of a union or for other protected activity under Section 7, even if limited to nonworking time, would necessarily involve political messaging. As acknowledged in *Janus*, management and labor often raise their voices in support of viewpoints positioned on opposite ends of the spectrum. *See Janus*, 138 S. Ct. at 2464. The State may not appropriate a nonconsenting individual's money, property, or expressive voice to

indicate support for contentious views with which one disagrees. *See, e.g.*, *Janus*, 138 S. Ct. at 2486; *Zerbst*, 304 U.S. at 464; *Knox*, 567 U.S. at 312-313. The majority rule in *Purple Communications* -- requiring an employer to subsidize speech with which it disagrees by paying for the email platform used to send, receive, and store that speech -- flies in the face of the application of the First Amendment in *Janus*.

Third, *Janus* validates the dissent's argument in *Purple Communications* that forcing an employer to pay for speech with which it disagrees, "*requires an employer to pay for its employees to freely insult* its business practices, services, products, management, and other coemployees on its own email". *Purple Communications,* 361 NLRB at 1106. As *Janus* makes clear, forcing one to "endorse ideas they find objectionable is always demeaning". *Janus*, 138 S. Ct. at 2464. Similarly, allowing employees to send emails likely to oppose employer policies and beliefs is "especially pernicious". *Purple Communications,* 361 NLRB at 1106 (Member Miscimarra, dissenting).

Fourth, not only is the Board prohibited from directing an employer to support viewpoints to which it does not subscribe, an employer also cannot be required to support union speech inconsistent with how it presents itself to the public. The Fourth Circuit in *Lee v. NLRB,* 393 F.3d 491, 495 (4th Cir. 2005) determined that compelling union-represented employees to wear a union logo on their uniforms violated the employee's Section 7 rights. Although the Fourth Circuit did not reach the merits of the First Amendment question presented, the thrust of the opinion nonetheless remains applicable to *Purple Communications, a*n employer "may prohibit display of union insignia where such display unreasonably interferes with its established public image". *Lee*, 393 F.3d at 495. Likewise, allowing an employee the right to use an employer's email system to engage in protected activity under Section 7 of the NLRA on nonworking time

assuredly results in the transmission of messages that run counter to the image employers work to build for themselves in the public eye. *See also Purple Communications*, 361 NLRB at 1107 (equating the nature of the violation to an employer "turn[ing] a huge megaphone against itself") (Member Miscimarra, dissenting).

Although the majority in *Purple Communications* suggested that an employer's public image cannot be embodied by an email message, the majority neglects to acknowledge that the employee's **apparent** authority to speak on behalf of the employer lies at the core of the employer-employee relationship. The majority, for instance, questions whether an email received from a Gmail account can be considered to speak for Google. *Purple Communications,* 361 NLRB at 1065. This, however, disregards an essential distinction of a Gmail account. A Gmail account user is not employed to speak for Google. The employer-employee relationship wherein the employee is imbued with the apparent authority to speak for the employer, oftentimes with an "employer.com" email address as noted in Member Miscimarra's dissent, presents a special circumstance and has generated its own subset of agency law opinions. *Id.* at 1107; *see also Burlington Industries v. Ellerth*; 524 U.S. 742, 758-60 (1998) (an employer may be subject to liability when there was reliance upon an employee's apparent authority or when an employee was aided in accomplishing a tort by the existence of the agency relation) (citing the RESTATEMENT 2D OF AGENCY, § 219(2)); *Toliver v. Sequoyah Fuels Cor.*, 1991 U.S. App. LEXIS 10622, at *6 (10th Cir. 1991) (imposing employer liability when there was reliance on apparent authority of the employee and the employee purported to speak on behalf of the employer) (applying the RESTATEMENT 2D OF AGENCY, § 219(2)). Transmitting messages with which an employer disagrees, yet carrying an employer's "employer.com" stamp of authority, cultivates a public understanding that an employer endorses messages contrary to the branding

their marketing teams take years to develop. When an employer is forced to make such a statement that it would not otherwise make if given a choice, the law requiring that statement is a blatant affront to the First Amendment.

C. UNIONS DO NOT HAVE A COMPELLING COUNTERVAILING INTEREST WHICH OUTWEIGHS AN EMPLOYER'S FIRST AMENDMENT RIGHTS.

It is well established that where ". . . the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." Wooley, 430 U.S. at 17. Assuming arguendo, this principle does not apply, nonetheless, to successfully overcome an argument alleging compelled speech brought under the First Amendment, union organizers and by implication the NLRB, must demonstrate a compelling countervailing interest which outweighs First Amendment concerns in the context of access to an email system. In this context the union and union employees cannot meet that burden.

Prohibiting union employees from using their employer's email system to engage in protected activity under Section 7 of the NLRA on nonworking time does not outweigh the First Amendment concerns presented in *Purple Communications*. When the state may "legitimately pursue such interests in any number of ways", First Amendment rights may not be abridged. *Id.*; *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

Alternatives exist for unions and union employees that would achieve union organizing interests recognized and given legal protection in Section 7 without sacrificing an employer's First Amendment freedoms. Union employees may exercise their Section 7 rights by means

which do not implicate tacit support by their employer. As suggested by Member Miscimarra's dissent in *Purple Communications*, several options are available to unions and union employees. For instance, union members may still exercise their Section 7 rights by distributing "union flyers or other communications" funded entirely by the union. *Purple Communications,* 361 NLRB at 1107 (Member Miscimarra, dissenting). Moreover, prohibiting the use of employer email for Section 7 activity does not foreclose the use of personal email accounts, Twitter, Facebook, Instagram, Snapchat and a myriad of other electronic/digital platforms to circulate the exact same message. *See* Harrison C. Kuntz, *Crossed Wires: Outdated Perceptions of Electronic Communications in the NLRB's Purple Communications Decision*, 94 Wash. U. L. Rev. 511, 537-540 (2017) (noting the increase in social media and other forms of electronic communication).

In short, employees may proceed the same as before, just through alternative channels. Thus, employees remain free to congregate in break rooms during breaks and at lunch. They remain free to gather in the parking lots during and after work and at coworkers homes or at the Elks or the Rotary Club. An employee's ability to exercise Section 7 rights would remain virtually equally available if *Purple Communications* were overturned.

II. ALTERNATIVELY, PERMITTING EMPLOYEE ACCESS TO AN EMAIL SYSTEM SOLELY FOR SECTION 7 PURPOSES CONSTITUTES IMPERMISSIBLE CONTENT DISCRIMINATION.

The *Purple Communication*'s rule fails for a second and independent reason. The rule discriminates on the basis of the content of the message. It is clear the NLRB does not have the authority to order employers to permit activities (in this case access to an email system) which do not have a relationship to wages, hours, and other terms and conditions of employment. *Cf.*, *Borg Warner v. NLRB*, 356 U.S. 342 (1958) (bargaining over non mandatory subjects not

required). Consider the subjects the NLRB is not compelling the employer permit employees to use its email system to perform: organizing a bake sale at a child's school, arranging volunteers for a soccer tournament, selling a used car or athletic gear, organizing a tailgate at a football game, etc.

The Court's decision in *R.A.V. v. City of St Paul*, 505 U.S. 377, 387 (1992) teaches that the "First Amendment imposes ... a content discrimination limitation upon a State's prohibition of proscribable speech." (internal quotations omitted). *Janus* now instructs the opposite is true, namely, that the State cannot compel speech based on its content.

It is obvious the *Purple Communications* rule is in fact based solely and exclusively on the content of the speech the employee wants to disseminate. The *Purple Communications* analysis requires the Board to conduct a searching inquiry to determine if the use of the email system involves speech which is both protected and concerted. *See e. g., St. Luke's*, 331 NLRB 761, 762 (2000) (comments during interview disparaging employer's services not protected); *Adelphi Inst.,* 287 NLRB 1073 (1988) (employee did not seek to induce group action). If the speech does not meet both requirements, the NLRB, based solely on the content of the speech, has no role to play.

III. THE BOARD SHOULD OVERRULE *PURPLE COMMUNICATIONS* BECAUSE IT IS INCONSISTENT WITH EMPLOYER'S RECOGNIZED PROPERTY AND SPEECH RIGHTS.

A. COURTS HAVE LONG RECOGNIZED EMPLOYER PROPERTY RIGHTS.

Employers "unquestionably [have] the right to regulate and restrict employee use of company property". *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983). The Board's holding in *Register Guard,* 351 NLRB 1110, 1114 (2007) recognized that an e-mail systems is an "[employer's] property and was purchased by the [employer] for use in operating it's business". In *Mid-Mountain Foods*, 332 NLRB 229 (2000), enfd., 269 F.3d 1075 (D.C. Cir. 2001), the Board held that employees did not have a statutory right to the use of an employer's video system. In reaching its decision, the Board reviewed a line of cases which held that the NLRA does not provide employees with a statutory right to use employer's property. *Id.* There is no right for employees to use an employer's public address system to convey union views. *See, e.g., The Heath Co.*, 196 NLRB 134 (1972). Employees are not entitled to use of an employer's bulletin board. *Eaton Technologies*, 322 NLRB 848, 853 (1997) *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 NLRB 318 fn.2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981) (per curiam). Similarly, employees have no statutory right to use an employer's telephone system for non-business purposes. *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987), *Union Carbide Corp.*, 259 NLRB 974, 980 (1981). Despite a long line of cases recognizing an employer's property rights in video equipment, public address system's, bulletin boards, and telephones, the NLRB's *Purple Communication*s rule carved out e-mail systems as an outlier.

It was well-established that employers may limit employees' use of company property, to business-related purposes, provided they do so consistently and without regard to the subject matter of the communications. *See Local 174, Int'l Union,UAW v. N.L.R.B.*, 645 F.2d 1151 (D.C. Cir. 1981). The *Purple Communications* decision dismissed this line of cases by concluding that they were limited to situations where there was discriminatory enforcement. *Purple Communications,* 361 NLRB at 1059. Additionally, the decision suggests that because an employer's property rights in chattel are less than those in real property, employees should have access to e-mail. This distinction has not been recognized by the courts as part of federal labor policy. *See U.S. v. Motzell*, 199 F. Supp 192 (D.N.J. 1961) (use of employer's equipment of resources for personal business constituted a thing of value). The NLRB's current rule creates a class of favored speech and then impermissibly compels that speech be communicated through an unwilling employer's email system. As this rule no longer withstands scrutiny it should be reversed.

B. THE USE OF PROPERTY TO DISPLAY A MESSAGE IS SPEECH WITHIN THE FIRST AMENDMENT

It has long been recognized that the First Amendment protection of speech "does not end at the spoken or written word." *Tex. v. Johnson*, 491 U.S. 397, 403. Conduct which is communicative is also protected by the First Amendment. The wearing of armbands, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969); picketing, *see, e. g., United States v. Grace*, 461 U.S. 171, 176 (1983); and monetary contributions, *Buckley v. Valeo*, 424 U.S. 1, 44 have all been found to be expressive conduct protected by the First Amendment. Indeed, just this term the Court held the State of California could not order a property owner to post a notice with which it disagreed. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018).

In *Wooley v. Maynard*, the Court held that the owner of a car could not be compelled to display a state motto on his vehicle license plate when he disagreed with the message. 430 U.S. 705, 717. The Court expressed concern about the private property being used to express an ideological message. *Id* at 715. *Purple Communications* requires that employer property, purchased for business use, be used to display or communicate messages with which the employer does not agree. This rule is now clearly impermissible (if it ever was).

IV. THE BOARD SHOULD RETURN TO THE STANDARD IN *REGISTER GUARD.*

Given *Janus* compels the Board to overrule *Purple Communications*, the issue becomes what standard should replace it. Amicus suggests the Board should return to the standard articulated in *Register Guard,* 351 NLRB 1110, supra. *Register Guard* afforded adequate protection for an employer's First Amendment freedoms "to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes" assuming the employer does so in a non-discriminatory manner. *Purple Communications*, 361 NLRB at 1050; *see also Register Guard*, 351 NLRB 1110 (2007), *enf'd in part, Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). As established above, the Constitution does not permit Congress to abridge an employer's right not to support or engage in speech with which it does not agree. Only a complete ban on an employee's use of employer funded email for Section 7 activities adequately resolves the First Amendment concerns present in *Purple Communications*. *Register Guard* appropriately articulates this standard and should be re-adopted.

CONCLUSION

For the foregoing reasons, the amici curiae Illinois State Chamber of Commerce respectfully request that the Board reject the position that a employer violates Section 8(a)(1) of the Act by prohibiting the use of its email system in nondiscriminatory facially neutral manner.

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Dated: October 5, 2018

CERTIFICATE OF SERVICE

I Douglas A. Darch, certify and declare as follows:

Pursuant to § 102.114, of the Rules and Regulations of the NLRB on October 5, 2018, I caused to be served the document described as **BRIEF OF *AMICUS CURIAE* ILLINOIS STATE CHAMBER OF COMMERCE** on the parties in this action in the manner described below.

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